IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al., Plaintiff, v. TYSON FOODS, INC., et al., Defendants.	Case No. 4:05-CV-329-JOE-SAJ

TYSON POULTRY, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COUNT 3 OF PLAINTIFFS' FIRST AMENDED COMPLAINT

COMES NOW Defendant Tyson Poultry, Inc., joined by Tyson Foods, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively, the "Tyson Defendants"), by and through their attorneys, and, in accordance with FED.R.CIV.P. 12 and LCvR7.1, submit the following reply in support of their Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint, asserting a citizen suit claim under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq*.

I. INTRODUCTION

Congress included citizen suit provisions in each of the major environmental statutes to ensure enforcement of environmental laws by allowing citizens to operate as private attorneys general. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). However, Congress qualified a citizen's ability to bring suit by requiring citizens to temporarily delay filing after providing notice of their potential claim to the appropriate regulatory authorities and to prospective defendants. *See id*. Notice serves the dual purposes of providing regulators with an opportunity to initiate an administrative enforcement action and allowing prospective defendants a chance to correct the alleged

problems. *See id*. As explained by the Tyson Defendants in their Motion to Dismiss, the State's RCRA citizen suit must be dismissed because the State of Oklahoma (the "State") failed to satisfy RCRA's mandatory notice requirements and because the State's citizen suit perverts RCRA's regulatory framework by preferring litigation over administrative regulation.

II. ARGUMENT

A. COURTS ROUTINELY DISMISS CITIZEN SUITS WHEN PLAINTIFFS FAIL TO SATISFY THE MANDATORY NOTICE REQUIREMENTS CONTAINED IN BOTH THE STATUTE AND THE APPLICABLE REGULATIONS.

The purpose of requiring citizen suit plaintiffs to provide pre-filing notice to regulatory authorities and potential defendants is to avoid the need for litigation by triggering agency enforcement and/or initiating corrective action by the potential defendants. *See Hallstrom*, 493 U.S. at 29. The clear majority of courts require citizen suit plaintiffs to satisfy the notice requirements set forth in the applicable environmental statute as well the statute's implementing regulations.[1] RCRA's citizen suit notice

[1] *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2nd Cir. 2001) (affirming dismissal of plaintiff's Clean Water Act ("CWA") claim because plaintiff failed to satisfy notice requirements in the statute **and** regulations); *Sierra Club Ohio Chapter v. City of Columbus*, 282 F.Supp.2d 756, 776 (S.D. Ohio 2003) (granting defendants' motion to dismiss because plaintiffs failed to provide pre-litigation notice required by the CWA **and** its implementing regulations); *Frilling v. Honda of America Mfg., Inc*., 101 F.Supp.2d 841, 845 (S.D. Ohio 1998) (failure to comply with the notice requirements in both the CWA **and** its implementing regulations warrants dismissal); *and Fried v. Sungard Recovery Servs., Inc*., 900 F.Supp. 758, 767 (E.D. Pa. 1995) (dismissing plaintiff's CERCLA citizen suit after rejecting plaintiff's argument that compliance with a **regulation's** notice requirements is waivable so long as plaintiff satisfies the **statute's** notice requirements). The linchpin of these cases is their reliance upon the Supreme Court's decision in *Hallstrom* which established that satisfaction of RCRA's citizen suit notice requirements is a mandatory precondition to filing suit and instructed courts to strictly construe notice requirements for citizen suits. *See Hallstrom*, 493 U.S. at 27-29.

requirements are set forth in 42 U.S.C. § 6972(b) and 40 C.F.R. Part 254.[2] Ignoring the plain language of the regulation, the State asserts that Part 254 applies only to "violation" citizen suits and not "endangerment" citizen suits like the one brought by the State. *See* Plaintiff's Response in Opposition ("Response") at 8-9. However, this precise argument was soundly rejected by the district court in *Darbouze v. Chevron Corp*., 1998 WL 42278 (January 8, 1998 E.D. Pa.). In *Darbouze*, the defendant moved to dismiss plaintiff's RCRA "endangerment" citizen suit for failure to provide adequate notice. Like the State in this matter, the plaintiff in *Darbouze* argued that 40 C.F.R. Part 254 applies to "violation" actions brought under 42 U.S.C. § 7002(a)(1)(A) and not "endangerment" actions brought under § 7002(a)(1)(B). *See id*. at * 2. The court rejected the plaintiff's argument as contrary to the plain language of the regulation which "specifies that it applies to actions brought under section 7002(a)(1), which includes both sections (A) and (B)." *Id*. The court then dismissed the plaintiff's "endangerment" citizen suit for failure to "provide adequate notice pursuant to 40 C.F.R. Part 254." *Id*. at *3; *citing Hallstrom*, 493 U.S. at 33.

Under *Darbouze, Hallstrom,* and the plain language of 40 C.F.R. Part 254, the State was required to give notice to the Director of the Arkansas Department of Environmental Quality ("ADEQ"). *See* 40 C.F.R. § 254.2(a)(1) ("A copy of the notice **shall** be mailed to…the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.") (emphasis added). The State concedes, as it must, that it failed to provide the Director of ADEQ

[2] Consistent with the Supreme Court's holding in *Hallstrom*, EPA states that the purpose of its RCRA citizen suit regulations is "to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 *as a prerequisite to the commencement of such actions*." 40 C.F.R. § 254.1 (emphasis added).

with notice of its citizen suit. *See* Response at 8. Therefore, like the district court in *Darbouze*, this Court should dismiss the State's citizen suit for failure to "provide adequate notice pursuant to 40 C.F.R. Part 254." *Darbouze*, at * 3; *Hallstrom*, 493 U.S. at 33.

The State may not avoid dismissal by arguing that this Court should determine the adequacy of the State's notice under a practical analysis which frames the inquiry as whether the State substantially satisfied RCRA's citizen suit notice requirements by providing the State's RCRA Notice[3] to Arkansas Governor Mike Huckabee. Several courts have rejected similar arguments from plaintiffs seeking to avoid dismissal of their citizen suits, recognizing that the policies behind citizen suits are best served by strict adherence to their notice requirements. *See, e.g., Roe v. Wert*, 706 F.Supp. 788 (W.D. Okla. 1989); *Sierra Club Ohio Chapter v. City of Columbus*, 282 F.Supp.2d 756 (S.D. Ohio 2003); and *Fried v. Sungard Recovery Servs*, 900 F. Supp. 758 (E.D. Pa. 1995).

In *Fried v. Sungard Recovery Servs*, the court considered whether it should dismiss plaintiffs' CERCLA citizen suit because plaintiffs failed to provide notice to each of the persons identified in CERCLA's citizen suit regulations. *See id*. at 766-67. The regulations required plaintiffs to give notice to four persons: (1) the potential defendant; (2) the United States Attorney General; (3) the Attorney General of the State in which the alleged violation occurred; and (4) EPA. *See id*. at 767. Despite this plain instruction, plaintiffs gave notice to: (1) the potential defendant; (2) Pennsylvania's Governor; (3)

[3] As defined in the Tyson Defendants' Motion to Dismiss, the "State's RCRA Notice" refers to the State's March 9, 2005 "Notice of Intent to File Citizen Suit Pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B)." The State's RCRA Notice is attached as Exhibit "1" to the Tyson Defendants' Motion to Dismiss and as Exhibit "5" to the State's First Amended Complaint.

Pennsylvania's Department of Natural Resources ("DER"); and (4) EPA. *See id.* Plaintiff argued that its failure to strictly satisfy the notice requirements was insignificant because the State did in fact receive notice of the suit. *See id.* Acknowledging that dismissal "may appear to place form over reason," the court dismissed plaintiff's claims for lack of jurisdiction because the "regulation clearly provides that *each* person listed must be notified before a suit may be commenced." *Id*. (emphasis in original). Therefore, like the court in *Sungard Recovery Servs.*, this Court should dismiss the State's RCRA claim because the State failed to provide notice to each person identified in RCRA's citizen suit regulations. *See id*. at 766-67.

B. THIS COURT MUST DISMISS THE STATE'S CITIZEN SUIT BECAUSE THE STATE'S RCRA NOTICE DID NOT PROVIDE THE TYSON DEFENDANTS WITH SUFFICIENT INFORMATION TO ABATE THE ALLEGED ENDANGERMENT AND AVOID LITIGATION.

RCRA requires that citizens "give[] notice of the endangerment" prior to filing a citizen suit. *See* 42 U.S.C. § 6972(b)(2)(A). The State takes the position that it has satisfied this content requirement for notice of its RCRA citizen suit because the State's notice letter alleges, in a generic, conclusory fashion, that defendants' "waste management and disposal practices" have caused "an imminent and substantial endangerment" in the Illinois River Watershed[4] over the course of the past twenty-five (25) years. *See* Response at 10-12. As demonstrated below, the State's position finds no support in cases considering whether a plaintiff's citizen suit notice contains sufficient information.

[4] As alleged by the State, the Illinois River Watershed covers approximately 1,069,530 acres. *See* First Amended Complaint, ¶ 22.

Assessing the adequacy of the State's RCRA Notice must begin by considering the purpose of providing notice, *i.e.*, to provide prospective defendants with sufficient information and time to identify and abate the cause of the alleged endangerment and to provide the appropriate regulatory agencies with sufficient information and time to initiate an enforcement action. *See Hallstrom*, 493 U.S. at 29. When assessing the adequacy of the notice given to potential defendants, courts do not assign talismanic properties to particular words or phrases, but instead engage in a practical inquiry of whether the notice is "sufficiently specific to inform the alleged violator about what he is doing wrong, so that it will know what corrective actions will avert a lawsuit." *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997). Therefore, the determination of whether the content of the State's RCRA Notice is legally sufficient cannot turn on how many times the State alleged the existence of "an imminent and substantial endangerment" in its notice letter. Instead, the adequacy of the State's RCRA Notice must be assessed by considering whether it contained sufficient information to inform the Tyson Defendants what they are allegedly "doing wrong" so that they could take measures to abate the alleged endangerment and avoid litigation.[5] *Id.*

Under this analysis, the State's RCRA Notice is patently insufficient. The State's RCRA Notice and citizen suit are directed toward certain poultry growers' practice of applying poultry litter as a natural fertilizer and soil amendment. This practice is lawful

[5] This discussion points out the legal insufficiencies in the State's RCRA Notice only. As more fully explained in other pleadings, the Tyson Defendants deny that they have engaged in any activity violating any statute, regulation, rule, order, or other requirement, or causing the damages or endangerment alleged by the State. *See, e.g.*, Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. to the First Amended Complaint, Docket No. 73.

and is specifically authorized by the State. *See* OKLA. STAT. tit 2, § 10-9.1 *et seq*., and OKLA. STAT. tit. 2, § 9-201 *et seq*. Therefore, unless the State is now taking the position that all land application of poultry litter is prohibited, the State's argument must rest upon the assumption that at some undetermined threshold level, poultry litter applied as a natural fertilizer and soil amendment should be characterized as "solid or hazardous waste" that may create a "substantial and imminent endangerment" within the meaning of RCRA.

The State's RCRA Notice does not contain any information regarding the threshold application level at which poultry litter may be regulated as "solid or hazardous waste" under RCRA. Moreover, nothing in the State's laws or regulations governing solid or hazardous wastes could provide any party with guidance on this matter. *See* OKLA. STAT. tit. § 27A, 2-7-101, *et seq*. and § 2-10-101 *et seq*. Consequently, the State's RCRA Notice is legally insufficient because the State has not provided the defendants with any practical means of discerning what they could do to avoid litigation.[6] *See Comm. Assoc. for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002); *Atlantic States Legal Found., Inc.*, 116 F.3d at 819. Therefore, this Court should dismiss the State's citizen suit for failure to satisfy RCRA's mandatory notice requirements. *See id.; Hallstrom*, 493 U.S. at 33.

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[6] In their Motion to Dismiss, the Tyson Defendants also established the facial inadequacy of the State's RCRA Notice by pointing out that it does not provide the Tyson Defendants with any useful information regarding the location of any "imminent and substantial endangerment" in the more than one million acres of the Illinois River Watershed or when, during the past twenty-five (25) years, any alleged endangerment existed. *See* Motion to Dismiss at 11-12. The State has failed to respond to these arguments, opting instead to simply repeat the deficient allegations found in the State's RCRA Notice. *See* Response at 11-12.

C. THIS COURT SHOULD DISMISS THE STATE'S CITIZEN SUIT BECAUSE CONGRESS NEVER INTENDED TO ALLOW STATES WITH DELEGATED RCRA AUTHORITY TO PURSUE CITIZEN SUITS INSTEAD OF FULFILLING THEIR REGULATORY OBLIGATIONS.

The State has not satisfied its burden of responding to the Tyson Defendants' substantive argument that the State is not a proper party to bring this citizen suit. As explained more fully in the Tyson Defendants' Motion to Dismiss, Congress never intended to allow states with delegated RCRA regulatory authority ("authorized States") to choose private citizen suits over fulfilling their regulatory responsibilities because Congress created citizen suits "to trigger agency enforcement and avoid a lawsuit." *Henry Bosma Dairy*, 305 F.3d at 953. Instead of explaining how its citizen suit properly fits within the regulatory framework established by Congress, the State asserts that the plain language of RCRA's citizen suit provision "controls whether the State may assert a citizen suit claim." *See* Response at 14.

However, the State ignores fact that when courts engage in statutory construction, their primary task is to effectuate the intent of Congress. *See St. Charles Investment Co. v. Comm'r of Internal Revenue*, 232 F.3d 773, 776 (10th Cir. 2000). To achieve this end, courts may properly look beyond the plain language of a particular statutory provision if: (1) strict adherence to the language creates absurd results that contravene the intent of Congress or; (2) the language is ambiguous because it is reasonably subject to differing interpretations. *See id.; United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 242-43 (1989). As demonstrated below, this rule of statutory construction compels this Court to look beyond the discrete language of RCRA's citizen suit provision and dismiss the State's citizen suit.

1. The State's Reading of RCRA's Citizen Suit Provision Creates Absurd Results that Contravene the Intent of Congress.

RCRA is unique among the federal environmental statutes because, unlike most statutes that provide for a complementary system of state and federal regulation, RCRA goes one step further and authorizes States to operate waste management programs that operate "in lieu" of federal programs. *See* 42 U.S.C. § 6926(b); *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002). States with delegated RCRA authority accept full responsibility for managing, within their borders, the waste governed by RCRA by administering comprehensive regulatory programs that issue and enforce permits for the storage, treatment, or disposal of solid and hazardous waste. *See id.* Consequently, each authorized State assumes primary responsibility for regulating solid and hazardous waste.

The Oklahoma Department of Environmental Quality ("ODEQ") operates comprehensive solid and hazardous waste management programs pursuant to its delegated federal authority under RCRA. *See* OKLA. STAT. tit. § 27A, 2-7-101, *et seq.* and § 2-10-101 *et seq*. When the State submitted its application for federal authorization of its RCRA program, the State certified that it has sufficient resources and laws to enforce its proposed program. *See* 40 C.F.R. § 271.7. Now, however, the State has seemingly disavowed its regulatory obligations, and instead decided to pursue private litigation of matters more properly subject to administrative review. This Court should dismiss the State's citizen suit claim because this type of litigation completely undermines the regulatory system created by Congress and agreed to by the State.

In its Response to the Tyson Defendants' Motion to Dismiss, the State cites several cases which it claims support the State's ability to bring the instant citizen suit.

See Response at 13-15. However, none of the cases cited by the State supports the State's argument that it can bring a RCRA citizen suit without first resorting to direct administrative or judicial enforcement proceedings under its RCRA regulatory program. *See, e.g., United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (distinguishable because Ohio did not have delegated RCRA authority when the litigation began); *United States v. Colorado*, 990 F.2d 1565, 1578 (10th Cir. 1993) (because Colorado did not assert a RCRA citizen suit claim, the court stated that it "need not decide" and "did not express any opinion" as to whether Colorado may have pursued a RCRA citizen suit); *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 121 (1st Cir. 1976) (stating that recourse to citizen suits is appropriate only when administrative action has failed to remedy the problem); and *Utah State Dep't of Health v. Ng*, 649 F.Supp. 1102, 1108 (D. Utah 1986) (allowing a state agency to bring a RCRA citizen suit under circumstances in which the state had been working with the EPA in an attempt to fulfill its delegated regulatory responsibilities). Therefore, taken as a whole or reviewed individually, the cases cited by the State cannot reasonably be read to allow a State with delegated RCRA authority to pursue a citizen suit without first attempting to directly fulfill its regulatory responsibilities.

In contrast to the cases cited by the State, *California v. Dep't of the Navy*, 631 F.Supp. 584 (N.D.Cal. 1986) stands out as the only case containing a substantive discussion of the nonsensical situation created by allowing a State with delegated regulatory authority to abandon that authority and instead to pursue private litigation by means of a citizen suit. As explained by the court in *Dep't of Navy*, allowing States with delegated authority to bring citizen suits is inconsistent with the overall statutory scheme

in which Congress envisioned that the States will be the primary enforcers of the pollution laws and that **citizens**[7] will bring suits against polluters "only when a state fails to take appropriate action." *Id*. at 588. Given the fact that Congress created citizen suits as a means for private citizens to spur regulators into action, this court should find that the State's citizen suit contravenes the intent of Congress and therefore dismiss the State's citizen suit claim. *See St. Charles Investment Co.*, 232 F.3d at 773; *accord United States v. Ron Pair Enters., Inc.*, 489 U.S. at 242 (if "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters…the intention of the drafters, rather than the strict language, controls.").

2. RCRA is Ambiguous Regarding Whether a State With Delegated RCRA Authority May Properly Bring a Citizen Suit.

Where Congress includes particular language in one part of a statute but omits it in another part of the same Act, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *accord Power Eng'g Co.*, 303 F.3d at 1238 (interpreting two clauses within the same RCRA sentence to have different meaning because one clause contained a phrase not found in the other). When two provisions of a statute have meanings which, if examined individually, seem clear but produce conflict when read together, the court must interpret the provisions in a manner that makes sense in light of congressional intent. *See Love v. Thomas*, 858 F.2d 1347, 1354 (9th Cir. 1988); *accord United States v. State of Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993).

[7] At least one other court has observed in a similar, though not identical context, that "States are not…private citizens, they are sovereigns." *See Shell Oil Co. v. Train*, 585 F.2d 408, 413 (9th Cir. 1978).

The only way to reconcile the language of RCRA's citizen suit section with RCRA's provision for delegating regulatory authority to States is to conclude that Congress never intended to allow authorized States to bring citizen suits without first attempting to directly fulfill their regulatory responsibilities through administrative or judicial proceedings.[8] Support for this construction can be found within the language of RCRA's citizen suit provision which provides that

> …any person may commence a civil action on its own behalf against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution…

42 U.S.C. § 6972(a)(1)(B). As set forth in the analysis found in *United States v. City of Hopewell*, 508 F.Supp. 526, 528 (E.D. Va. 1980), this language can be read to mean that Congress never intended authorized States to be plaintiffs in citizen suits.

In *City of Hopewell*, the district court followed standard rules of statutory construction to interpret a substantially-similar citizen suit provision found in the CWA. In *Hopewell*, the federal government filed a civil complaint against the City of Hopewell alleging violations of the CWA. The State of Virginia joined the action against the City of Hopewell and the City moved to have the State dismissed as a party plaintiff. *See id.* at 527. The State argued that it should be permitted to maintain its action against the City under the CWA's citizen suit provision. *See* 33 U.S.C. § 1365. That section provides:

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[8] This construction gives force and effect to the citizen suit provision consistent with the broader regulatory framework set forth in the statute as a whole because it maintains RCRA's delegation of regulatory responsibilities to States while allowing public interests to be protected by citizen suits that promote, rather than replace administrative enforcement. *See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf…against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution…

Id. at § 1365(a)(1). Much like the arguments made by the State in the instant case, Virginia argued that it could maintain a citizen suit because the CWA defines "citizen" to include a "person" and "person" is defined to include a State. *See* 508 F.Supp. at 528; 33 U.S.C. §§ 1362(5), 1365(g), respectively.

The district court rejected Virginia's "mechanical" reading of the CWA's citizen suit provision. Instead, the court construed this section within the broader provisions of the statute and held that that "Congress clearly did not perceive of a State as a citizen for purposes of citizen's suits under § 1365." As partial support for its holding, the court reasoned that the qualifying language in the sentence describing "persons" who may be subject to citizen suits demonstrated a congressional intent that "the United States, States, State instrumentalities and agencies, and the Administrator, will be parties **defendant** in citizen's suits." *Id*. at 528 (emphasis added).

RCRA's citizen suit section is substantially similar to the CWA citizen suit section analyzed in *Hopewell*. Like its CWA counterpart, RCRA's citizen suit provision contains an unqualified statement that any "person" may bring a citizen suit, but then employs a modifying clause to provide that such suit may be brought against any "person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution…."[9] The

[9] This exact phrase, *i.e*, "any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution…" is also found within the CWA's citizen suit provision and was interpreted in *Hopewell* to mean States and State

rules of statutory construction forbid courts from construing statutes in a manner that renders words superfluous and instead, compel this Court to presume "that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion" of these words. *Brown v. Gardner*, 513 U.S. at 120; *accord Power Eng'g Co.*, 303 F.3d at 1238. Therefore, under the standard rules of statutory construction and the analysis found in *Hopewell*, this Court should determine that Congress never intended to allow citizen suits under the circumstances presented by this case and dismiss the State's citizen suit.

III. CONCLUSION

For the reasons stated herein and in Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of the Plaintiffs' First Amended Complaint and Integrated Opening Brief in Support, the Tyson Defendants respectfully request this Court to enter an order dismissing Count 3 of Plaintiffs' First Amended Complaint for failure to state a claim upon which relief may be granted and/or for lack of subject matter jurisdiction, and to grant the Tyson Defendants such other and further relief as this Court deems just and proper.

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instrumentalities and agencies. *See Hopewell*, 508 F.Supp. at 528; 33 U.S.C. § 1365(a).

DATED December 6, 2005.

Respectfully submitted,

By:/s/ *Stephen L. Jantzen*

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